In the Supreme Court of the United States

October Term, 1955

S. D. WARREN COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

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208-042—66

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 939

S. D. WARREN COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is officially reported at 353 F. 2d 494 (Pet. 20–30, 33). The Board's decision and order in the unfair labor practice case (R.A. 815–819 [1]) are reported at 150 N.L.R.B. No. 132. The Board's decision and direction of election in the underlying representation case (Pet. 34–42) are reported at 144 N.L.R.B. 204.

JURISDICTION

The decision and decree of the court of appeals were entered on November 8, 1965 (Pet. 20, 31). A

[1] "R.A." references are to the portions of the record printed for the use of the court below and filed with the petition for certiorari.

petition for rehearing was denied on December 17, 1965 (Pet. 33), and a motion for reconsideration was denied on January 14, 1966 (Pet. 2). The petition for a writ of certiorari was filed on January 22, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board abused its discretion under Section 9(b) of the National Labor Relations Act in establishing a bargaining unit confined to the employees of the Engineering Division of the employer's paper mill.

STATUTE INVOLVED

Section 9(b) of the National Labor Relations Act, 49 Stat. 453, 29 U.S.C. 159(b), provides in pertinent part:

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof * * *.

STATEMENT

At the hearing on a joint representation petition filed by the International Association of Machinists, AFL–CIO, International Brotherhood of Electrical Workers, AFL–CIO, the International Brotherhood of Firemen and Oilers, AFL–CIO (hereinafter "the Unions"), which sought the establishment of a unit of maintenance employees at petitioner's Cumberland

Mill in Westbrook, Maine, the following facts were adduced:

The Cumberland Mill is engaged in the manufacture and sale of fine printing and specialty papers, and has had no history of collective bargaining (Pet. 36; R.A. 111). The mill (which consists of a complex of connected buildings covering approximately 4 miles, and 3 power plants located at distances of between one and 12 miles from the complex) is divided administratively into 10 separately supervised divisions, each consisting of a number of departments (Pet. 36; R.A. 274–280); eight divisions are concerned directly with the production and manufacture of paper (Pet. 36). The mill employs approximately 2,700 employees, of which some 400 are in the Engineering Division (Pet. 36; R.A. 105, 108–110). The work of the Engineering Division is devoted approximately one-third to maintenance, one-third to new construction, and one-third to utilities and related activities (Pet. 36; R.A. 393).

The Engineering Division, like each of the other divisions, has its own separate line of supervision, running from top management through the multiple departments it includes (Pet. 38; R.A. 207–300). It is primarily staffed with employees trained [2] to perform the more highly skilled craft and other duties required to maintain mill operations and to expand its facilities, as well as with employees capable of

[2] The Company does not have a formal apprenticeship program, but does provide on-the-job training under which a helper advances by stages within a given job classification under an established progression schedule (Pet. 37; R.A. 310–312, 351–352, 384–386).

running the mill utilities (Pet. 38; R.A. 297–300, 301–303, 335–336, 360–361, 364, 373, 385–386). The employees in the division are distributed among the various craft shops located throughout the mill, such as metal working, carpentry, and rigging, and in the various powerhouse departments (Pet. 38; R.A. 297–300, 301–303).

Although the production divisions also have employees who perform maintenance work, theirs is largely of a minor or preventive nature (Pet. 37; R.A. 133, 202, 257); major maintenance jobs are carried out almost entirely under the Engineering Division's supervision. Thus, when a maintenance job is beyond the capability of maintenance employees in the various production divisions, a request for specialized workmen is made to the Engineering Division (Pet. 38; R.A. 364–365, 472–473, 179, 202, 238, 347–349). The specialized equipment in the various craft shops in the Engineering Division is not utilized by the employees of other divisions (Pet. 39) and, conversely, none of the Engineering Division employees operates production machines (Pet. 39). The Company closes the mill for about one week every year, at which time the Engineering Division rebuilds, replaces, and repairs mill machinery and buildings, and engages in new construction work (Pet. 39; R.A. 223–224). Also, while the mill operates on a 24-hour basis, in four shifts (Pet. 37; R.A. 114, 125–126), 70 percent of the Engineering Division employees work on the day shift (R.A. 272). Employees directly engaged in papermaking are on a bonus-incentive system (Pet. 37; R.A. 125–127), but

none of the Engineering Division employees is on bonus (R.A. 312).

On these facts, the Board (with one Member dissenting) concluded (Pet. 39):

> In all the circumstances of this case, including the absence of any bargaining history and the fact that the Engineering Division is a distinct administrative subdivision of the Employer, having a functional base of maintenance, construction, and utility work and employing primarily skilled employees who work out of their respective craft shops and do not work directly in the productive process, we agree with the Regional Director's conclusion that * * * [a] unit limited to the Engineering Division * * * is appropriate for collective bargaining purposes. * * *

The Board added that, although there was some overlapping of work skills among some of the employees doing maintenance work in the production divisions and some of the less skilled employees in the Engineering Division, this factor was not "sufficient to destroy the homogeneity and mutuality of interests of employees in the Engineering Division" (Pet. 39–40). Finally, the Board found that the degree of integration between the Engineering and the other divisions was not such as to preclude the establishment of a less-than-plant-wide unit (Pet. 40). Accordingly, the Board directed an election among the Engineering Division employees (Pet. 40).[3]

[3] The Board excluded 17 Engineering Division employees who were permanently assigned to the production divisions, finding that for all practical purposes these employees were not part of the Engineering Division (Pet. 39, n. 4).

The Unions won the election and were certified by the Board as the joint collective bargaining representative of the Engineering Division employees (R.A. 627–628), but the company refused the Unions' request to bargain, asserting that the Board's unit determination was invalid (R. A. 810; 59–60). In the ensuing unfair labor practice case, the Board, reaffirming its prior unit determination, held that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act (R.A. 813–814). The Board ordered the Company to cease and desist from its unfair labor practice and to bargain with the Union upon request (R.A. 815–819).

The court of appeals (per Judge Madden) found that the Board had not abused its discretion in establishing a unit limited to the Engineering Division, and enforced the Board's bargaining order (Pet. 20–30).

ARGUMENT

The decision of the court of appeals is correct, and there is no conflict of decisions. Further review is not warranted.

Section 9(b) of the National Labor Relations Act gives the Board wide discretion to determine whether the unit appropriate for collective bargaining "shall be the employer unit, craft unit, plant unit, or subdivision thereof." As the court below properly found, the Board did not abuse that discretion here. The Engineering Division is a "subdivision" of the plant, having been created by the Company itself as one of its ten separately supervised divisions; the employees in that Division have special skills and spend

a substantial portion of their time on tasks different from those engaged in by the other employees (*e.g.*, major maintenance, construction, and utilities); and there is no history of bargaining on a company- or plant-wide basis. In these circumstances, the Board's finding that the Engineering Division was an appropriate bargaining unit was reasonable. See *Armstrong Cork Co.*, 80 N.L.R.B. 1328; *East Texas Pulp & Paper Co.*, 113 N.L.R.B. 539, 542–544; *E. I. DuPont (Dana Plant)*, 117 N.L.R.B. 1048; *American Brass Co.*, 120 N.L.R.B. 1276, 1278–1279; *American Cyanamid Co.*, 131 N.L.R.B. 909.

Petitioner relies on *National Labor Relations Board* v. *Pittsburgh Plate Glass Co.*, 270 F. 2d 167 (C.A. 4), certiorari denied, 361 U.S. 943, and *Royal McBee Corp.* v. *National Labor Relations Board*, 302 F. 2d 330 (C.A. 4), but those cases are not in point. In *Pittsburgh*, the Board, applying its *American Potash* doctrine,[4] had established, on the petition of the Electrical Workers, a craft unit of electricians at the company's glass-manufacturing plant. In so doing, the Board had considered neither the highly integrated nature of the operation nor the history of bargaining on a plant-wide basis at the company's other plants and in the glass industry generally. The Fourth Cir-

[4] In *American Potash & Chemical Corp.*, 107 N.L.R.B. 1418, the Board had held that, where a craft unit was sought to be severed from a pre-existing larger unit, such severance would be permitted, regardless of the degree of integration of operations or of the prior bargaining history, if (1) the employees sought to be represented constituted a true craft group and (2) the union seeking to represent them was a traditional representative of that craft.

cuit held that it was arbitrary for the Board to apply the *American Potash* doctrine in the glass industry at the same time that the Board was applying a different craft-severance policy in four other industries no more integrated than the glass industry.[5]

In *Royal McBee* (Pet. 45–49), there had been 13 years of bargaining on a plantwide basis (133 N.L.R.B. 1450, 1452) at the Company's Hartford plant when it transferred operations to Springfield, Missouri. The Board, applying its *American Potash* doctrine, permitted severance of an electrical craft unit at the new location upon the petition of the Electrical Workers, a traditional representative of that craft, without taking into account the integrated nature of the operations or the prior bargaining history. The Fourth Circuit, following its earlier decision in *Pittsburgh Plate Glass,* held that the Board was arbitrary in applying the *American Potash* doctrine to the typewriter industry while applying a different rule to other industries.

Since there was no effort in the present case to sever a craft unit from a pre-existing plant-wide unit—the situation with which the Board's *American Potash* doctrine deals—that doctrine is completely inapplicable and there is consequently no question of the discriminatory application of the doctrine—the

[5] In *American Potash*, *supra*, the Board had indicated that it would continue to consider integration of operations and prior bargaining history—as required by its earlier *National Tube* decision, 76 N.L.R.B. 1199—as a guide to craft-severance policy in four specific industries, *viz.*, steel, wet milling, lumber, and aluminum.

issue in *Pittsburgh* and *Royal McBee*. The appropriateness of the unit here was determined, not under the *American Potash* principle, which is inapplicable to some industries, but under principles that are uniformly applicable to all industries (see p. 7, *supra*) and take into account all relevant considerations, including the extent of integration of the employer's operation.[6]

The decision below is also consistent with *National Labor Relations Board* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438. The court below properly found that here, unlike *Metropolitan*, the Board in its published decision had adequately recited the reasons for its unit determination and those reasons were valid (Pet. 28). And, since the court did sustain the Board's unit determination here, petitioner's assertion that the court, had it reached a contrary conclusion, would have interpreted *Metropolitan* to mean the the reviewing court has no discretion to deny enforcement of the Board's order but must in every case remand the case to the Board, is purely hypothetical; it does not present a justiciable issue.

[6] As pointed out in the Statement, *supra*, p. 5, the Board found that the degree of integration between Engineering and the other divisions was not such as to preclude the establishment of a less-than-plant-wide unit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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PETITIONER'S REPLY BRIEF

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